

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

JAMES GILLIAM, Individually And On Behalf Of)
All Others Similarly Situated,)
Plaintiff,) Civil Action No. 04cv11600 (RGS)
vs.)
FIDELITY MANAGEMENT AND RESEARCH)
COMPANY, et al.,)
Defendants.)
BOGATIN FAMILY TRUST, Individually And On)
Behalf Of All Others Similarly Situated,)
Plaintiff,) Civil Action No. 04cv11642 (RGS)
vs.)
FIDELITY MANAGEMENT AND RESEARCH)
COMPANY, et al.,)
Defendants.)
CYNTHIA A. BENNETT and GUY E. MILLER,)
Plaintiffs,)
vs.) Civil Action No. 04cv11651 (RGS)
FIDELITY MANAGEMENT AND RESEARCH)
COMPANY, et al.,)
Defendants.)

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**MOTION TO STRIKE THE FIDELITY DEFENDANTS'
MOTION FOR CONSOLIDATION AND SEVERANCE OF CLAIMS**

GHASSAN J. AWALI et al., Individually And On)
Behalf Of All Others Similarly Situated,)
Plaintiff,) Civil Action No. 04cv11709 (RGS)
vs.)
FIDELITY MANAGEMENT AND RESEARCH)
COMPANY, et al.,)
Defendants.)
WILLIAM S. GROESCHEL, Individually And On)
Behalf Of All Others Similarly Situated,)
Plaintiff,) Civil Action No. 04cv11735 (RGS)
vs.)
FIDELITY MANAGEMENT AND RESEARCH)
COMPANY, et al.,)
Defendants.)
NANCY HAUGEN, MICHAEL F. MAGNAN,)
KAREN L. MAGNAN, ROSE M. IANNACCONE,)
PRESLEY C. PHILLIPS, ANDREA M. PHILLIPS,)
and CINDY SCHURGIN, for the use and benefit of)
FIDELITY MAGELLAN AND FIDELITY) Civil Action No. 04cv11756 (MLW)
CONTRAFUND,)
Plaintiffs,)
vs.)
FIDELITY MANAGEMENT AND RESEARCH)
COMPANY, et al.,)
Defendants.)

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DAVID O. FALLERT, Individually And On Behalf)
Of All Others Similarly Situated,)
Plaintiff,) Civil Action No. 04cv11812 (RGS)
vs.)
FIDELITY MANAGEMENT AND RESEARCH)
COMPANY, et al.,)
Defendants.)

Plaintiffs James Gilliam, Bogatin Family Trust, William S. Groeschel, Ghassan J. Awali, Marina Berti, Valeriex A. Daspit, Arthur G. Denker, Randall C. Heyward, Stanley H. Krupa, Nicole Lenzi, David M. Lucoff, Joseph F. Martingano, Michael S. Mendolia, Patricia K. Munshaw, Brian D. Reese, Jay J. Rupp, Gilbert P. Travis, Jewel R. Travis and David O. Fallert (the “*Gilliam* Plaintiffs”) hereby move to strike the motion of the Fidelity Defendants for consolidation and severance of claims.¹

The Fidelity Defendants cite no authority that allows them to slice up the *Gilliam* Plaintiffs’ complaint and redistribute the claims to various judges of their own choosing. The Fidelity Defendants do not even cite the rule of federal procedure under which they are proceeding.² The motion, made without any legal basis, should be stricken.

Moreover, the Fidelity Defendants’ motion for severance of claims is just another (belated) response to the *Gilliam* Plaintiffs’ motion for consolidation of the seven pending excessive fee cases in this jurisdiction (the “*Gilliam* Consolidation Motion”). That motion has been fully briefed and is pending before the Court. A decision on the *Gilliam* Consolidation Motion will render Defendants’ instant motion moot and it therefore should be stricken as it threatens to waste judicial resources and produce inconsistent adjudications. In fact, all of the arguments that Defendants now raise should have been made when they filed their opposition to the *Gilliam* Consolidation Motion during the regular briefing cycle. As there is a fully briefed

¹ By moving to strike Defendants’ motion, the *Gilliam* Plaintiffs do not waive any right to respond to the substantive issues raised in the motion.

² To the extent the Fidelity Defendants may rely on Rule 21 of the Federal Rules of Civil Procedure as authority for their motion, they are mistaken. Rule 21 governs improper joinder of parties and allows for a party who claims improper joinder to sever claims and litigate them in a separate proceeding. This is not the case here nor do Defendants claim it is.

consolidation motion pending, Defendants' new arguments on the structure of these cases come too late and should not be accepted as a "new" motion³

CONCLUSION

For the reasons detailed herein, Plaintiffs respectfully request this Court to strike the Fidelity Defendants' Motion for Consolidation and Severance of Claims or, in the alternative, grant the *Gilliam* Plaintiffs 14 days to respond to the motion on the merits.

Dated: December 23, 2004

MOULTON & GANS, P.C.

By: /s/ Nancy Freeman Gans
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³ Although the *Gilliam* Plaintiffs do not respond to this improper and duplicative motion on the merits, it must be noted that by arguing that claims in the *Gilliam* cases should be transferred to Judge Wolfe and consolidated with the *Bennett* and *Haugen* actions, the Fidelity Defendants implicitly concede that there are related claims in the seven actions. Defendants' instant motion therefore fully supports the arguments by the *Gilliam* Plaintiffs that these seven excessive fee cases should be consolidated. Nevertheless, the Fidelity Defendants' motion attempting, for their own advantage, to maneuver claims into two separate proceedings should be stricken.

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LOCAL RULE 7.1(A)(2) CERTIFICATE

I, Nancy Freeman Gans, hereby certify that on December 23, 2004, I spoke by telephone with the following counsel regarding The Motion to Strike the Fidelity Defendants' Motion for Consolidation and Severance of Claims: (1) John Farley, Esquire, Goodwin Procter LLP, counsel for the Fidelity Defendants, who opposes the motion.

/s/ Nancy Freeman Gans
Nancy Freeman Gans

CERTIFICATE OF SERVICE

I, Nancy Freeman Gans, hereby certify that I served a copy of the foregoing document upon counsel for all parties by facsimile this 23d day of December, 2004.

/s/ Nancy Freeman Gans
Nancy Freeman Gans